Act he, those who resided with him, his lodgers and sub-tenants were expected to conduct themselves in such manner that they did not deviate from the code of accepted moral conduct in relation to sexual behaviour and did not cause a nuisance or persistent annoyance to others in the neighbourhood and that the premises were not used for any illegal purpose by any of them.

The appeal is allowed. The order of the learned magistrate is set aside. The respondent is ordered to deliver vacant possession of the premises to the appellant on or before the 30th November 1973. The appellant will have his cost of the appeal.

Appeal allowed.

Solicitors: *Soo Wai San & Co.; Thevin, Chandran & Siva.*

IKAU ANAK MAIL v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Gill and Ali F.JJ.) September 18, 1973]
[Kuching — Federal Court Criminal Appeal No. 4 of 1973]

Criminal Law and Procedure — Charge of murder — Defence of provocation — Burden of proof — Penal Code, s. 300, Exception 1.

Evidence Ordinance s. 105 — Defence of provocation — Burden of proof.

Penal Code, s. 300, Exception 1 — Provocation — Burden of proof.

In this case the appellant had been convicted of murder. The defence of the appellant was provocation. It was alleged that there had been some dispute between the appellant and his former wife (the deceased) relating to joint property and when the deceased accused the appellant of cheating, he pulled out a knife from his pocket and stabbed her twice. The appellant also stabbed the uncle of his former wife who had rushed to separate the two. On appeal it was argued (a) that the learned trial judge had erred in his direction on the burden of proof of provocation; (b) that the learned trial judge had failed to point out that there had been a series of acts of provocation given earlier; (c) that the learned judge and the assessors had failed to direct their minds to the gravity of the accusation on the rural mind of the appellant.

Held: (1) although the learned trial judge had pointed out that the burden of proof was on the accused to prove provocation on a balance of probability he had also stated that if the court were left with a reasonable doubt as to whether there was provocation or not they had to accept the defence. There was therefore no ground of complaint as regards his direction on the burden of proof;

(2) the learned trial judge had in fact referred in his summing-up to the previous acts of provocation;

(3) to succeed on a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court not only that by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control. In this case the learned trial judge had correctly directed the assessors and himself on this question.

Cases referred to:-

(1) *Jayasena* v. *R.* [1970] A.C. 618; [1970] 1 All E.R. 219.

(2) *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462.

(3) *Looi Wooi Saik* v. *Public Prosecutor* [1962] M.L.J. 337.

FEDERAL COURT.

Yee Shin Ching for the appellant.

Steve Shim for the respondent.

Azmi L.P.: The appellant was charged as follows:—

(1) "That you on or about the 9th day of December, 1971 at 1000 hours or thereabout, at the District Office, Bintulu, committed murder by causing the death of one, *SENIA ANAK KUN* (f) and you thereby committed an offence punishable under section 302 of the Penal Code.
(2) "That you on or about the 9th day of December, 1971 at 1000 hours or thereabout, at the District Office, Bintulu, committed murder by causing the death of one *ABANG ANAK LAWANG* (m) and you thereby committed an offence punishable under section 302 of the Penal Code."

The facts showed that Senia anak Kun and Ikau anak Mail obtained a divorce from the Native Court. Subsequently, it was necessary to distribute the joint property consisting of a joint bilek and a rubber garden. It would appear that at a certain stage of the negotiation, Senia had acquiesced to leave both the bilek and the rubber garden to a young girl who was to be adopted as their child. Later, Senia changed her mind. It was for the purpose of settling this matter that the Administrative Officer, Banabas Sato, called them to his office. Senia arrived at the office first accompanied by her mother, Bijau anak Lawang, her uncle, Abang anak Lawang and several others. The court interpreter, William Sandah further asked her about the joint property. She insisted that she would not give up the bilek and the rubber garden, but would agree to give the rubber garden to their child after she had come of age. Subsequently, the appellant arrived. When the Administrative Officer asked him about the joint property he reiterated that these two things should go to the child. Upon hearing this, Senia said "That is cheating. I do not want to be cheated." The appellant who happened to be standing near her cried out "This is not cheating. Where is the cheating?", and thereupon he pulled out a knife from his pocket with which he stabbed her twice. Abang rushed to separate the two and in the course of doing so he was also stabbed by the appellant. Both Senia and Abang subsequently died.

At the trial the assessors found that the appellant was guilty of murdering Senia. In reference to the second charge they found the appellant guilty only of culpable homicide, not amounting to murder. The court passed a sentence of death on the first charge and ten years' imprisonment on the second charge.

The appellant appealed to the Federal Court against conviction and sentence in respect of the first charge.

Although several grounds were argued before us, we need refer to only three, because in our view the other grounds are of no substance.

The first ground of appeal was a complaint against the summing-up of the learned judge on the question of burden of proof. It was argued in effect that the learned judge had failed to direct the assessors that in a charge of murder the burden is on the prosecution to show the absence of any provocation. The learned judge did at one stage of his summing-up point out that there was a burden on the accused to prove on a balance of probability that he was deprived of the

power of self-control by reason of provocation, but at another part of his summing-up he said that if the court were left with a reasonable doubt as to whether there was provocation or not then they have to accept that the defence had succeeded in bringing his case within Exception 1 of section 300 of the Penal Code. In our view there is no ground for this complaint.

On the question of the defence of provocation however, the Privy Council in the Ceylonese case of *Jayasena* v. *Regina*[1] has ruled that the burder of proving accident, provocation, or self-defence rested upon the accused and could not be construed in the light of a decision in *Woolmington* v. *Director of Public Prosecutions*[2] that had changed the English law. In the Federation we have been following the decision in *Woolmington's* case as is apparent in the judgment of the Court of Appeal (as it was then known) in the case of *Looi Wooi Saik* v. *Public Prosecutor*.[3] The provision of section 105 of the Evidence Ordinance of Ceylon is similar to our section 105. *Looi Wooi Saik's* case would, therefore, appear to have been overruled, but we have to say that this matter was not fully argued before us.

In the second ground it was argued that the learned judge had failed to point out to the assessors that there had been a series of acts of provocation given by the deceased Senia in repeatedly accusing the appellant of being unfaithful to her and also of being a stupid person, and the final act of accusing him of being a cheat must have such effect on the appellant that it was reasonable to infer that he had lost control of himself when he stabbed Senia. Our attention was also drawn to the following passage in the summing-up:

"... In considering this defence the mental background created by the previous acts of Senia at the longhouse on 13/11/71 may be taken into consideration to ascertain whether the subsequent act of Senia and or Abang caused grave and sudden provocation for committing the offences charged...."

In view of this direction, we are therefore of the opinion that there is no substance in this ground.

The third ground was to the effect that both the learned judge and the assessors had failed to direct their minds to the gravity of the accusation on the rural mind of the appellant. According to the appellant the distribution of the joint property had been approved by the Native Court. We understood this ground to suggest that in considering the question of provocation the fact that the appellant was a simple-minded person should have been considered. To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that not only by the acts of the deceased that the accused had been deprived of the power of self-control, but such acts of provocation would also have deprived a reasonable man of the power of self-control. We have no means of knowing the reasons why the assessors had rejected the defence of provocation in this case. It could be that they were not satisfied that the appellant had been deprived of the power of self-control within the requirement of the law or that they had rejected it because in the circumstances of the case a reasonable man would not have been so deprived. We found, however, that the learned judge had correctly directed the assessors and himself on this question, and we therefore have to dismiss this ground also.

In the result the appeal against conviction and sentence is dismissed.

Appeal dismissed.

NG SIEW SAN v. MENAKA

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.) October 6, 1973]

[Kuala Lumpur — Federal Court Civil Appeal No. 90 of 1972]

Contract — Loan made by moneylender in name other than registered name — Agreement forbidden by law — Contract void — Whether moneylender entitled to get recovery of money lent — Parties unaware of illegality until after execution of the contract — Contracts (Malay States) Ordinance, 1950, ss. 24 and 66.

Moneylenders — Money lent by moneylender in name other than registered name — Loan illegal and void — Moneylenders Ordinance, 1951, ss. 8(b) & (c) and 16.

In this case the respondent by her attorney had lent money to the appellant on the security of a charge of certain lands belonging to the appellant. The respondent was a registered moneylender carrying on business under the name of AR.PR.M. Firm but the loan in this case was made by the attorney on behalf of the respondent personally. The respondent applied for an order for sale of the lands to satisfy the principal sum and interest. The appellant objected to the application on the ground, *inter alia*, that as the loan was not made in the registered name of the moneylender the moneylender had contravened section 8(b) and (c) of the Moneylenders Ordinance. The learned trial judge held that the provisions of section 8(b) and (c) of the Moneylenders Ordinance had been contravened and therefore the loan was illegal and void ([1973] 1 M.L.J. 50). He held however that section 66 of the Contracts (Malay States) Ordinance applied and he made an order that the application for the order of sale be dismissed upon payment of the sum of $19,400, the balance of the principal sum. The appellant appealed on the ground that the learned trial judge was wrong in directing him to pay to the respondent the sum of $19,400 as a condition of obtaining the relief he sought. The respondent cross appealed and contended that the learned trial judge was wrong in holding that section 8(b) and (c) of the Moneylenders Ordinance had been contravened and that the loan transaction was therefore illegal and void.

Held: (Azmi L.P. and Suffian F.J., Ong Hock Sim F.J. dissenting): (1) the agreement in this case was forbidden by section 8(b) and (c) of the Moneylenders Ordinance and therefore the agreement was void;

(2) the learned trial judge was correct in the circumstances of this case in finding that neither the respondent nor her attorney was aware of the illegality of the transaction at the time of the execution of the documents and therefore section 66 of the Contracts (Malay States) Ordinance was applicable and the learned trial judge was right in ordering the return of the sum of $19,400 to the respondent;

(3) the respondent was entitled to interest at the rate of 6% on such sum from the date of the institution of the suit.

Cases referred to:

(1) *Cope* v. *Rowlands* (1836) 2 M. & W. 149 at p. 157.

(2) *Whiteman* v. *Sadler* [1910] A.C. 514 at p. 526.

(3) *Kanuari Sivaramakrishnaiah* v. *Vemuri Venkata Narchari Rao* A.I.R. 1960 And. Pra. 186 at p. 188.

(4) *Harnath Kaur* v. *Indar Bahador Singh* L.R. 50 I.A. 69.

(5) *Societe Belge de Banque* v. *Girdhari Lal* A.I.R. 1940 P.C. 09, 91.

(6) *Barrell* v. *Fordree* [1932] A.C. 676, 682.

(7) *Chai Sau Yin* v. *Kok Seng Fatt* [1966] 2 M.L.J. 54 at 56.

(8) *Kasumu* v. *Baba-Egbe* [1965] 3 All E.R. 266, 271.

(9) *Whiteman* v. *Sadler* [1910] A.C. 514 at 535.